UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D.R. HORTON, INC.	)	Cases 12-CA-25764
Respondent	)	
and	)	
MICHAEL CUDA	)	
an Individual	)	

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY

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INTRODUCTION

The Council on Labor Law Equality ("COLLE") submits this *amicus* brief pursuant to the Board's Notice and Invitation to File Briefs dated June 16, 2011. The Notice and Invitation sets forth the issues to be addressed as follows:

> Did the Respondent violate Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action?

COLLE respectfully submits that agreements between employers and employees to resolve disputes between them in arbitration on an individual basis, entered into as a condition of employment, are required to be enforced under the Federal Arbitration Act ("FAA") and a uniform line of decisions by the United States Supreme Court, and do not abridge any rights conferred under Section 7 of the National Labor Relations Act ("NLRA" or the "Act"), or violate Section 8(a)(1) of the Act.

The Supreme Court ruled in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1745 (2011), that the FAA vests parties with "discretion in designing arbitration processes [ ] to allow for efficient, streamlined procedures tailored to the type of dispute," including processes that exclude class action procedures, and mandates enforcement of those agreements "according to their terms." *Id.* at 1748-49. Similarly, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 25 (1991), ruled that the FAA requires the enforcement of agreements to arbitrate employment claims "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator . . . ." *Id.* at 32

(quotation omitted). It cannot reasonably be disputed, therefore, that agreements to arbitrate workplace claims on an individual basis are required to be enforced under the FAA.

Nor do such agreements abridge Section 7 rights. Section 7 protects workers from workplace retaliation when they concertedly avail themselves of judicial remedies for mutual aid and protection, but does not purport to dictate the judicial remedies or procedures required to be utilized for claims arising under statutes other than the NLRA. Section 7, therefore, does not stand as an obstacle to the FAA's mandate that courts enforce agreements between employers and employees to arbitrate on an individual basis disputes arising under statutes other than the NLRA. At most, Section 7 dictates that such agreements may not abridge a worker's right to file a charge with the Board, and that workers who concertedly challenge the validity of such agreements may not be subject to retaliation for doing so. These points are undisputed by the parties to this case, including the Acting General Counsel. (Acting General Counsel's Reply Brief To Respondent's Answering Brief, at 2) ("As stated at page 7 of the brief in support of exceptions, an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement.").

For these reasons, as discussed in more detail below, *Amicus Curiae* COLLE respectfully requests that the Board find that agreements by employers and employees to resolve disputes between them in arbitration on an individual basis, entered into as a condition of employment, do not violate Section 8(a)(1) of the Act provided that such agreements do not restrict an employee's right to file a charge with the Board and permit workers to challenge the validity of such agreements without retaliation, because such agreements are protected by the FAA and do not abridge Section 7 rights.

INTEREST OF THE *AMICUS CURIAE*

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the NLRA. COLLE's single purpose is to follow the activities of the NLRB and the courts as they relate to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

ARGUMENT

I. The Board and the Courts Have Long Favored Arbitration As A Means Of Resolving Workplace Disputes.

A. The Federal Arbitration Act Expresses A Strong National Policy Favoring Arbitration, And Requires Courts to Enforce Arbitration Agreements According To Their Terms.

As the Supreme Court has recognized in a long line of uniform authority, Congress, through the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., has set forth a liberal federal policy favoring arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1745 (2011) ("We have described this provision as reflecting both a liberal federal policy favoring arbitration, . . . and the fundamental principle that arbitration is a matter of contract.") (quotations and citations omitted); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 25 (1991) ("These provisions manifest a liberal federal policy favoring arbitration agreements.") (quotation omitted). The FAA mandates that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Arbitration agreements may be invalidated only by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses

that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

The FAA requires courts confronted with valid arbitration agreements to "direct[] the parties to proceed to arbitration *in accordance with the terms of the agreement*." 9 U.S.C. § 4 (emphasis added); *See also Concepcion*, 131 S. Ct. at 1745-46, 1748-49 ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'") (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ*., 489 U.S. 468, 478 (1989)); *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

B. The Board Has Long Held That National Labor Policy Strongly Favors Arbitration.

"It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes. The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contests and forums." *Olin Corp.*, 268 NLRB 573, 574 (1984). Over the years, the Board "has played a key role in fostering a climate in which arbitration could flourish." *United Tech., Corp.*, 268 NLRB 557, 558 (1984) (noting that "arbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy").

Further, "[i]f complete effectuation of the Federal policy is to be achieved…the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process[.]" *Int'l Harvester Co.*, 138 NLRB 923,

927 (1962); *see also 14 Penn Plaza LLC v. Pyett,* 556 U.S. 247; 129 S. Ct. 1456, 1465 (2010) ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."); *Steelworkers v. Am. Mfg. Co.,* 363 U.S. 564, 567 (1960) ("Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.").

II. Employers And Employees May Agree, As A Condition Of Employment, To Resolve Their Disputes By Arbitration On An Individual Basis.

A. Courts Have Long Held That Employees May Agree To The Adjudication Of Their Employment Disputes By Arbitration.

It is well-established and undisputed that an employee may validly waive his or her right to pursue individual claims in a judicial forum by entering into an arbitration agreement, even where statutory rights are invoked, because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 33 (an employer may require an employee, as a condition of employment, to channel employment claims to a private arbitral forum for resolution); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law[.]"); *Arrigo v. Blue Fish Commodities, Inc.*, No. 10-829-cv, 2011 WL 350478, at *1 (2d Cir. 2011) (arbitration provision in employee's employment agreement encompassed claims under FLSA and state law); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998) (finding "Title VII entirely compatible with applying the FAA to agreements to arbitrate Title VII claims").

B. Even Pre-*Concepcion*, Numerous Courts Enforced Arbitration Agreements With Class/Collective Action Waivers.

For the same reasons – that an individual may waive the right to proceed in court as long as the waiver does not affect substantive rights afforded by a statute – numerous courts have upheld arbitration agreements, required as a condition of employment, containing class/ collective action waivers. *See, e.g.*, *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (enforcing a waiver of class claims with respect to FLSA claims and other claims under federal statutes and compelling arbitration of dispute, holding that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition'") (quoting *Gilmer*, 500 U.S. at 31); *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (arbitration agreements precluding class action relief are valid and enforceable); *see also Vilches v. Travelers Cos.*, No. 10-2888, 2011 WL 453304, at *6 (3d Cir. Feb. 9, 2011) (upholding class action waiver of FLSA and New Jersey wage and hour claims); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (affirming an order to compel plaintiffs' FLSA claims to arbitration on an individual basis, finding that a waiver of the right to proceed collectively does not deprive plaintiffs of substantive rights under the FLSA).[1] These cases hold

[1] *See also Adkins v. Labor Ready, Inc*., 303 F.3d 496, 503 (4th Cir. 2002) (affirming an order to compel plaintiff's FLSA claim to arbitration on an individual basis, finding "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute"); *Horenstein v. Mortg. Mkt., Inc*., 9 Fed. Appx. 618, 619 (9th Cir. 2001) (affirming an order to compel plaintiffs' FLSA claims to arbitration, holding that "[a]lthough plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute"); *Johnson v. West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000) (even if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by the relevant statute); *La Torre v. BFS Retail & Commercial Operations, LLC*, No. 08-22046, 2008 WL 5156301, at *3-5 (S.D. Fla. Dec. 8, 2008) (compelling arbitration of FLSA claims and enforcing collective action waiver); *Reid v. SuperShuttle Intl., Inc*., No. 08-4854, 2010 WL 1049613, at *2 (E.D.N.Y. Mar. 22, 2010)

that an employee's waiver of the procedural right to proceed on a class or collective basis did not affect the employee's substantive rights under the relevant statute.

C. The Supreme Court's *Concepcion* Decision Requires Enforcement Of Arbitration Agreements With Class Action Waivers Pursuant to the FAA.

The Supreme Court's recent decision in *Concepcion* ended the debate with respect to whether the FAA requires the enforcement of an arbitration agreement that contains a class action waiver. In *Concepcion*, the Supreme Court held that states cannot condition the enforceability of arbitration agreements on the availability of class-wide arbitration procedures. *Id.* at 1753. Specifically, the Supreme Court held that the FAA preempted the rule announced by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 171-72 (2005) – that class action waivers in arbitration agreements are unconscionable when "the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another . . . ." *Discover Bank*, 36 Cal.4th at 163 (quotation omitted). In overruling *Discover Bank*, the Supreme Court made clear that the FAA requires the enforcement of arbitration agreements "according to their terms," and a rule that invalidates an arbitration agreement because the parties agreed to waive class actions is precluded by the FAA:

> The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

(compelling arbitration of FLSA claims and finding class action waiver valid); *Johnson v. The Pep Boys — Manny, Moe & Jack, Inc.*, No. 08-2313-WSD, slip op. at 23 (N.D. Ga. Nov. 25, 2008) ("[C]ollective action waivers in arbitrations agreements are valid and enforceable, including as they apply to FLSA claims."); *cf. Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 819 (11th Cir. 2001) ("Giving full weight to the congressional policy embodied in the FAA…a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA.") (emphasis added).

Concepcion, 131 S. Ct. at 1748.

The Supreme Court further emphasized that the FAA affords parties "discretion in designing arbitration processes [which] allow[s] for efficient, streamlined procedures tailored to the type of dispute" and mandates enforcement of those agreements "according to their terms." *Id.* at 1748-49. Because the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" the Supreme Court has "held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), to arbitrate according to specific rules, *Volt, supra,* at 479, 109 S.Ct. 1248, and to limit *with whom* a party will arbitrate its disputes, *Stolt–Nielsen, supra,* at ——, 130 S.Ct. at 1773." *Id.* at 1748-49.

Addressing the parties' discretion to agree to preclude classwide arbitration, the Supreme Court found arbitration ill-suited for the litigation of class claims:

- "First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751.
- "Second, class arbitration *requires* procedural formality . . . We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925 . . . And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied." *Id.* at 1751-52 (alteration in original).

- "Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims . . . Arbitration is poorly suited to the higher stakes of class litigation." *Id.* at 1752.

The Court concluded that Congress could not have intended that class procedures be available in arbitration in order for an arbitration agreement to be enforceable. *Id.* at 1752 ("We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."). *See also Gilmer*, 500 U.S. at 25 (the FAA requires the enforcement of agreements to arbitrate employment claims "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator") (quotation omitted);[2] *Stolt-Nielson SA v. AnimalFeeds Int'l. Corp.*, 130 S. Ct. 1758, 1775 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private

[2] Even if the plaintiff in *Gilmer* could have pursued a collective action under the ADEA under arbitral rules for the securities industry in effect at the time, the Court in *Gilmer*, while recognizing that fact, ruled further that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator," the arbitration agreement still was required to be enforced. *Id.* at 33 (quotation omitted).

dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.")

After *Concepcion*, it can no longer be argued that an arbitration agreement with a class waiver can be viewed as "two analytically distinct" agreements – one of which can be enforced under the FAA (arbitration) without the other (class waiver). (*See* Brief of *Amici Curiae* SEIU, Sanders, and Bayer, at 16). Under *Concepcion*, parties are afforded "discretion in designing arbitration processes [ ] to allow for efficient, streamlined procedures tailored to the type of dispute," including the waiver of class action procedures, and the FAA mandates enforcement of those agreements "according to their terms." *Id.* at 1748-49. The result advocated by Amicus Curiae SEIU is the same result held incompatible with the FAA in *Concepcion* – requiring the availability of class arbitration procedures as a condition to the enforcement of an arbitration agreement. It is beyond doubt after *Concepcion*, however, that the FAA requires the enforcement of arbitration agreements with class waivers.

III. There Is No Conflict Between the FAA and the NLRA in Enforcing Arbitration Agreements With Class/Collective Action Waivers Because The NLRA Does Not Mandate The Procedures Applicable To The Adjudication Of Claims Under Other Statutes.

When there are two federal laws that address the same subject, courts and the Board should give effect to both statutes when addressing this overlap. *See Muller v. Lujan*, 928 F.2d 207, 211 (6th Cir. 1991) (citing *U.S. v. Borden Co*., 308 U.S. 188, 198 (1930)) (courts are not at liberty to choose among congressional enactments, and when two statutes are capable of co-existence it is the duty of courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective). The Board itself has recognized this rule:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and

> it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Int'l Harvester Co., 138 NLRB at 927 (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)); *see also Collyer*, 192 NLRB 837, 840 (1971) ("Labor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress.").

There is no conflict between the FAA's mandate that arbitration agreements with class waivers be enforced and rights conferred by Section 7. Section 7 protects workers from workplace retaliation when they concertedly avail themselves of judicial remedies for mutual aid and protection, but does not purport to dictate the judicial remedies or procedures for claims arising under statutes other than the NLRA.

Rule 23 is a rule of procedure to help federal courts deal with claims that a large number of parties may have in common. Fed. R. Civ. P. 23. It applies to any civil claim that can meet its criteria and is not limited to the adjudication of workplace claims. The criteria for certifying a class bear little relation to the scope of Section 7 protected concerted activity. Rule 23 requires a sufficiently numerous class, typically considered 40 or more, and focuses on whether judicial efficiency will result from the certification of a class. Fed. R. Civ. P. 23(a)(1); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266-67 (11th Cir. 2009).

The FLSA permits plaintiffs to proceed collectively if they are similarly situated, and the Supreme Court has authorized district courts to exercise discretion in determining whether to permit workers to proceed collectively, after considering whether judicial efficiency will result, and discretion to send notice of the case as a case management tool. *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The judicial system benefits by efficient resolution in one

proceeding of common issues of law and fact arising from the same alleged discriminatory activity.").

Section 7 did not create these procedures, did not mandate their creation, and does not stand in the way of agreements for alternative forms of dispute resolution. If Section 7 were the source of authority for these procedures they would be required to be coextensive with Section 7, which they indisputably are not. For example, Rule 23's numerosity requirement, which generally requires 40 or more class members for certification, would conflict with (and be precluded by) Section 7, which protects activity involving two or more employees. Moreover, the decision of whether to permit workers to proceed as a class or collective could not be left to the discretion of the district judge, after considering factors including judicial efficiency, if the workers' right to proceed collectively was mandated by Section 7. None of these issues arise, however, because Section 7 simply does not speak to the procedures for adjudicating violations of laws or statutes other than the NLRA. And, as noted above, numerous courts have ruled that these procedures – under the sources of law that created them – are not substantive rights and may be waived. *See, e.g.*, *Caley*, 428 F.3d at 1378 (enforcing a waiver of class claims with respect to FLSA claims and other claims under federal statutes and compelling arbitration of dispute, holding that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition'") (quoting *Gilmer*, 500 U.S. at 31).[3]

Section 7 and the NLRA protect (1) the form of adjudication of violations of the NLRA, and (2) prohibiting retaliation against workers when they engage in activity for their mutual aid

[3] *See also, Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims"); *Blaz v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) ("there is no substantive right to a class remedy; a class action is a procedural device").

and protection with respect to workplace issues, including by utilizing available judicial recourse. Therefore, the decisions recognizing that workers who have filed a class or collective action may not be retaliated against for having done so simply reflect that Section 7 may protect a worker from retaliation for having utilized available judicial recourse,[4] but do not stand for the proposition that Section 7 mandates the form or procedures for adjudicating disputes that arise under statutes other than the NLRA. Consistent with these points, Section 7 may protect workers from retaliation for concertedly challenging the validity of an arbitration agreement if it otherwise constitutes protected concerted activity. And it is *these* rights that may not be waived – protection from retaliation for engaging in protected concerted activity, and the right to file a charge with the Board – not the forum or procedures for adjudicating disputes arising under statutes other than the NLRA. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 1465 (2010) ("'Judicial nullification of contractual concessions ... is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act-freedom of contract.'") (quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 328, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974) (Stewart, J., concurring in part and dissenting in part)).

These points are not disputed by the parties to this action. The Acting General Counsel agrees that "an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement." (Acting General Counsel's Reply Brief To Respondent's Answering Brief, at 2). This position is consistent with the General Counsel's Guideline Memo Concerning Employer Waivers in Mandatory Arbitration Agreements, GC Memo 10-06, at 5-6 (June 16, 2010) ("While an

[4] *See, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978) (recognizing the right of employees to be free from employer retaliation when they resort to administrative or judicial forums to address working conditions); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000) (same).

employer may not condition employment on its employees' waiving collective rights protected by the NLRA, individual employees possessed of an individual right to sue to enforce non-NLRA employment rights can enter into binding individual agreements regarding the resolution of their individual rights in arbitration.").[5]

Thus, as long as the two interests protected by the NLRA are not violated by an agreement to arbitrate on an individual basis – the right to act concertedly to challenge the validity of the agreement and the right to file a charge with the Board – the agreement to arbitrate on an individual basis does not violate Section 8(a)(1) of the Act.

IV. The SEIU's Policy Concerns Are Unfounded.

The SEIU's various policy concerns are unfounded and have been rejected by the Supreme Court. For example, the SEIU asserts that the unavailability of class/collective actions will mean that employees are less likely to assert their claims because most of their claims are too small to matter, and class action waivers impose significant procedural, economic and other burdens upon employees seeking to pursue workplace claims. (*See* SEIU Brief at 13, 19-21). Contrary to this argument, one of the primary strengths of arbitration, as recognized by the Supreme Court, is the fact that it eliminates procedural burdens, increases the efficient handling of claims, reduces costs and makes it easier for litigants to pursue their claims. *See Concepcion*, 131 S. Ct. at 1748-49; *Circuit City Stores, Inc.*, 532 U.S. at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in

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[5] In addition, Section 7 will not be implicated in many situations because purely individual activity will be involved. *See Holling Press, Inc.*, 343 NLRB 301, 302 (2004); *United Pacific Ins.*, 270 NLRB 981, 982 (1984). The Board has long rejected the notion that a single employee seeking to enforce a statute designed to benefit all employees is automatically engaged in protected, concerted activity. *See Meyers Indus.*, 281 NLRB 882, 889 n. 11 (1986) (noting Board's decision in *Meyers Indus.*, 268 NLRB 493 (1984), overruling *Alleluia Cushion Co*., 221 NLRB 999, 1000 (1975)). Thus, employees may not be engaged in concerted activity even when they avail themselves of judicial remedies if they are not acting in concert with others.

employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."). Indeed, the Court in *Concepcion* noted that allowing class actions in the arbitration context would eliminate many of these advantages. 131 S. Ct. at 1751.

The SEIU also argues that the fear of employer retaliation is more pronounced in connection with individual claims than with class claims. (*See* SEIU Brief at 21-22). There is little support for this claim, particularly in the context of collective actions under the FLSA and the Age Discrimination in Employment Act. Under these statutes, employees are required to affirmatively state that they are participating in the lawsuit by opting in to a collective action. Such a procedure clearly puts their employer on notice of their identities. Moreover, like the NLRA, most employment law statutes prohibit retaliation against employees for their participation in such suits.

In addition, the SEIU argues that class/collective actions serve to inform employees of legal rights of which they would not otherwise be aware. (*See* SEIU Brief at 22-23). Again, this is not true because many employment law statutes, including the FLSA, the ADEA, and Title VII, require employers to post information regarding employee's rights in conspicuous places.

Finally, the SEIU argues that "the only reason employers impose class action prohibitions on their workers is to limit the employer's liability for their unlawful conduct." (*See* SEIU Brief at 19-20). The *Concepcion* Court offered several reasons why this is not true. *See Concepcion*, 131 S. Ct. at 1751-52. Single plaintiff arbitration cases are resolved much quicker than class action arbitrations—a benefit to both employers and employees. *See id*. at 1751. Moreover, reasonable employers likely would not agree to arbitrate employment claims if required to permit class procedures because arbitration is not well-suited to the utilization of such procedures and there is little opportunity for review in the event that the arbitrator makes an error. *Id.* at 1752.

Notably, the SEIU's arguments and policy considerations rely heavily on the decision by the California Supreme Court in *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), which followed *Discover Bank* in ruling that "class arbitration waivers should not be enforced if a trial court determines, based on the factors discussed below, that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." *Id.* at 450. As it had done in *Discover Bank*, the California court again rejected the argument "that compelling class arbitration in the appropriate case violates the FAA." *Id.* at 465 (citing *Discover Bank v. Superior Court*, 36 Cal.4th 148, 171-72 (2005)). Now that the United States Supreme Court has overruled *Discover Bank*, *Gentry* likely has been overruled and is highly questionable authority on which to base the Board's decision.

In any event, the policy issues have already been decided by Congress when it passed the FAA, and by the unassailable authority concluding that agreements to arbitrate on an individual basis must be enforced "according to their terms." *Concepcion*, 131 S. Ct. at 1748-49.

CONCLUSION

In conclusion, the Board should hold that arbitration agreements between employers and employees entered into as a condition of employment, including agreements to arbitrate claims individually, do not violate section 8(a)(1) of the Act. Such a holding is required by the FAA, consistent with the NLRA, and supported by the Acting General Counsel.

For all of these reasons, *Amicus Curiae* COLLE respectfully requests that the Board rule that the Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 27th day of July, 2011, I served the foregoing amicus brief, via the Board's electronic filing system and via e-mail, upon the following:

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